



In the Matter of:

TED ELTZROTH,

ARB CASE NO. 98-002

COMPLAINANT,

(ALJ CASE NO. 97-ERA-031)

v.

DATE: April 15, 1999

AMERSHAM MEDI-PHYSICS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Ted Eltzroth, *Pro Se*

For the Respondent:

Alan King, Esq., *Gardner, Carton & Douglas, Chicago, Illinois*

FINAL DECISION AND ORDER

This case arises under Section 211, the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1994), and the regulations promulgated thereunder at 29 C.F.R. Part 24.^{1/} Complainant Ted Eltzroth (Eltzroth) alleged that Respondent Amersham Medi-Physics, Inc. (Amersham), violated the ERA when it discharged

^{1/} These regulations were amended in February 1998 to provide, *inter alia*, for review of ERA and other "whistleblower" complaints upon the filing of an appeal by a party aggrieved by an Administrative Law Judge's decision. See 63 Fed. Reg. 6614 (Feb. 9, 1998). In this case, the Administrative Law Judge issued a recommended decision and order on October 2, 1997; accordingly, this matter is before the Board pursuant to the pre-1998 automatic review provision of the regulation at 29 C.F.R. §24.6(a) (1997).

him from employment. In an October 2, 1997 Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) determined that Eltzroth did not establish that Amersham was motivated by unlawful *animus* in terminating his employment. R. D. and O. at 15. Further, the ALJ concluded that Eltzroth was discharged from employment for a legitimate, non-discriminatory reason unrelated to activity protected by the ERA. *Id.* Accordingly, the ALJ recommended that the complaint be dismissed.

We have reviewed the record in this case thoroughly. We conclude that it fully supports the ALJ's conclusion that Eltzroth was not fired for engaging in activities protected by the ERA, but for refusing to perform the job for which he was hired. R. D. and O. at 15. We dismiss the complaint.

BACKGROUND

We concur with the ALJ's assessment that the record evidence concerning Eltzroth's hiring, employment and termination is "largely undisputed." R. D. and O. at 9. We briefly summarize the pertinent evidence here.

On January 28, 1997, Eltzroth was interviewed for a full-time position with Amersham to last for a period of one year. R. D. and O. at 3, 4. Eltzroth was interviewed for the position of Iodine (I)-125 Seeds Inspector by Raymond Wronkiewicz (Wronkiewicz), Amersham's quality control supervisor, who was also to be Eltzroth's direct supervisor. R. D. and O. at 9. Wronkiewicz informed Eltzroth of the nature of the job, including the fact that the job entailed some exposure to radiation within applicable Amersham guidelines and regulatory limits.^{2/} *Id.* Eltzroth accepted the conditions of employment. *Id.* The position for which Eltzroth was hired entailed visual and physical inspection of I-125 seeds, which are radioactive pellets.^{3/}

Amersham used a variety of methods to monitor levels of radiation to which employees inspecting I-125 seeds were exposed. Actual radiation exposure was measured by nuclear emulsion badges (also known as dosimeter badges). One dosimeter badge measured whole body exposure, while another -- which was located on a ring worn on the employee's hand under the leaded protective gloves -- measured exposure to the employee's hand. The dosimeter badges were sent out to a third party for reading. Tr. 53, 74-5, 84, 113. Amersham also performed surveys of the area behind the shield where the seeds were placed on the tray for examination to verify the level of radiation to which inspectors would be exposed while measuring the I-125 seeds. Tr. 74, 80-81.

^{2/} Wronkiewicz also showed Eltzroth the bulletin board where employee radiation dose rates were posted, and told Eltzroth he could expect to receive doses similar to those for Wronkiewicz. Respondent's Exhibit (RX) 3 at 3.

^{3/} The I-125 seeds were located behind a leaded plexiglass shield and the inspector handled the seeds using tweezers and protective leaded gloves. R. D. and O. at 5. The inspector picked up the I-125 seeds one at a time with the tweezers and sized the seeds with a measuring tool. *Id.* at 4.

Eltzroth's first day of work was February 3, 1997, and on that day Amersham provided him with radiation safety training. The following day, Eltzroth underwent training for his position's seed inspection duties. R. D. and O. at 4. While inspecting a batch of the I-125 seeds as part of his inspection training, Eltzroth inserted a radiation detector inside one of the protective gloves used in the inspection process.^{4/} Eltzroth testified that he performed this self-designed test in order to determine whether he was adequately protected from radiation. R. D. and O. at 4. The detector indicated that radiation was penetrating the protective glove. Eltzroth concluded that the gloves provided "little or no protection" from radiation, and consequently he refused to continue the seeds inspection. *See* Tr. 12-13.

Eltzroth's inspection trainer, Judy Graney, then took Eltzroth to talk to his supervisor, Wronkiewicz. Wronkiewicz tried to "assuage Complainant's apprehension" over the issue of exposure to radiation. R. D. and O. at 9. He explained the shielding used, and told Eltzroth that the leaded gloves reduced exposures to extremely low levels.^{5/} Eltzroth told Wronkiewicz that he needed to think about the matter overnight and would talk to him the next day. Wronkiewicz then advised Eltzroth that he should discuss the matter with Edward Zdunek (Zdunek), Amersham's Radiation Safety Officer.

Eltzroth had formal training in physics, including a bachelor's degree in engineering physics. Tr. 8-9. However, his physics background was not in radiation. Tr. 12. After work that day, he performed calculations purporting to show that the Amersham inspection process was generating exposure levels at the rate of 1 to 1.5 rads per hour in the vicinity of the seeds. Eltzroth believed that the federal annual exposure level was 75 rads.^{6/} Eltzroth testified that his results were theoretical rather than being based on actual measurements. R. D. and O. at 4; Tr. 15, 37.

The next day, February 5, Eltzroth met with Radiation Safety Officer Zdunek. Eltzroth explained his fears regarding radiation exposure, and described the calculations he had done the night before.^{7/} Zdunek told Eltzroth that the protective gloves reduced radiation exposure to

^{4/} According to Amersham's Radiation Safety Officer, the radiation detector that Eltzroth inserted into the protective glove (a Ludlum model 12 probe) was calibrated to detect the presence of *any* radioactive contamination. The radiation detector was extremely sensitive and, among other things, was used by Amersham to detect whether any I-125 seeds might have been overlooked at the work station once the seeds had been put away. Tr. 67, 68.

^{5/} No one claimed that the gloves eliminated all exposure to radiation.

^{6/} OSHA regulations limit workers in restricted areas to whole body radiation exposure of 1 1/4 rems per calendar quarter (5 rems per year) and exposure to hands and forearms, and feet and ankles to 18 3/4 rems per calendar quarter (75 rems per year). 29 C.F.R. §1910.1096(b) (1998).

^{7/} The dissent emphasizes that Eltzroth had two concerns, *i.e.* "the actual radiation dose emanating from the I-125 seeds," and "actual exposure levels resulting to his unshielded forearms." Dissent, p. (continued...)

levels well within regulatory limits. He also explained that Amersham's internal limits were lower than regulatory limits set by the government. Zdunek agreed with Eltzroth that other things could be done to reduce exposures even further. However, Zdunek stated that the whole body radiation dose for the seeds inspection position was not even measurable, and that the extremity dose was very low in relation to regulatory limits. Zdunek also offered to provide Eltzroth with documentation on the biological effects of radiation and other materials "that might better explain that the levels that he would be working with would not pose any significant risk." RX 3 at 1; R. D. and O. at 6. Eltzroth did not request to see any of that information. RX 3 at 1. He stated that he was still uncomfortable working with the I-125 seeds. *Id.*

When Wronkiewicz arrived later in the day, he learned that Eltzroth was continuing to refuse to work with the I-125 seeds. Wronkiewicz asked Eltzroth if he had decided whether he would perform his assigned job duties.^{8/} Eltzroth told Wronkiewicz that he would not work with the I-125 seeds unless arrangements were made "to reduce his exposure to 0." RX 3 at 5; T. 128. Wronkiewicz responded that he thought it was unreasonable for Eltzroth "to ask for restricted duty" RX 3 at 5. Eltzroth replied that he would not inspect the seeds without additional shielding. *Id.* When Wronkiewicz asked again if Eltzroth would do his job, Eltzroth replied that he wanted to think about it overnight. *Id.* After consulting with other management officials, Wronkiewicz informed Eltzroth that he was being terminated.^{9/} RX 3 at 5; T. 128.

DISCUSSION

The ALJ found that Eltzroth established a *prima facie* case of retaliatory discrimination. R. D. and O. at 9-11. The ALJ concluded, however, that Amersham produced sufficient evidence of a legitimate, nondiscriminatory reason for its decision to discharge Eltzroth from employment. *Id.* at 13. Finally, the ALJ held that Eltzroth failed to demonstrate that

^{7/}(...continued)

14, *infra*. Although Eltzroth expressed concern about his forearms at the hearing, there is nothing in the record from which to conclude that Eltzroth voiced that concern to his supervisors at Amersham at the time of his work refusal. All of the evidence regarding Eltzroth's conversations with his supervisors relates to his apprehension about the level of exposure to his hands and the adequacy of the leaded gloves.

^{8/} Eltzroth testified that in Wronkiewicz's presence he again tested the I-125 inspection area with the radiation detector, this time placing eight layers of protective gloves over the I-125 seeds. The radiation detector showed the presence of radiation. T.14. Wronkiewicz did not testify regarding this incident.

^{9/} After his termination, Eltzroth filed a complaint with the Illinois Department of Nuclear Safety (IDNS), alleging that radiation levels exceeded prescribed safety limits. After its investigation, IDNS reported that Amersham's I-125 inspection facility used appropriate shielding techniques, and that records revealed no employee radiation exposure to be in excess of the regulatory or administrative limits. IDNS also concluded that Eltzroth was terminated for refusal to perform required duties, rather than because of his safety concerns. RX 1.

Amersham's reason for the adverse action was merely a pretext for a forbidden retaliatory motive. *Id.* at 14, 15.

Because this case was fully tried on the merits, it was not necessary for the ALJ to determine whether Eltzroth presented a *prima facie* case. Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *U.S.P.S. v. Aikens*, 460 U.S. 711, 713-714 (1983); *Roadway Express v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Final Dec. and Ord., Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). With that in mind we address the issues in this case.

The ALJ properly found that both Eltzroth's safety complaints to Amersham representatives and his initial refusal to work were protected activities. Internal safety complaints like those demonstrated on the present record are protected under the ERA. 42 U.S.C. §5851(a)(1)(A) (1994). However, as the ALJ found, Amersham did not discharge Eltzroth because of those complaints. R. D. and O. at 15. Thus, we must focus our attention on Eltzroth's work refusal.

The Secretary and the ARB have held that an employee's work refusal based on a reasonable good faith belief that working conditions are unsafe is protected activity under the ERA employee protection provision. In *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-2, Sec. Dec. and Ord., Jan. 13, 1984, the Secretary first articulated the work refusal right:

A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience.

Slip op. at 6-7. See *Dobreunaski v. Associated Universities, Inc.*, ARB Case No. 97-125, ALJ Case No. 96-ERA-44, ARB Final Dec. and Ord., June 18, 1998.

However, a refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and, if found safe, adequately explained to the employee. *Dobreunaski v. Associated Universities, Inc.*, *supra*, slip op. at 12; *Tritt v. Fluor Constructors, Inc.*, Case No. 88-ERA-29, Sec. Dec. and Ord. of Rem., Aug. 25, 1993, slip op. at 6-7, *petition dismissed sub nom. Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997); *Van Beck v. Daniel Construction Co.*, Case No. 86-ERA-26, Sec. Dec. and Ord. of Rem., Aug. 3, 1993, slip op. at 3.

Eltzroth's initial refusal to work was protected under the ERA employee protection provision.^{10/} However, for reasons we discuss below, his refusal lost that protection. Therefore, Amersham did not violate the ERA in terminating Eltzroth's employment when he continued to refuse to do the job for which he was hired.

After Eltzroth's initial refusal to perform the inspection on February 4, Amersham (through Wronkiewicz and Zdunek) made significant efforts to investigate and to explain the safety of the work area to Eltzroth. The record reflects that Amersham officials had three conversations with Eltzroth over two days in an effort to allay his concerns.

^{10/} We agree with the ALJ that Eltzroth had a reasonable, good faith belief that working with the I-125 seeds exposed him to unsafe levels of radiation. We note, however, that the facts as presented do not indicate that the seeds inspection technicians actually were exposed to prohibited levels of radiation. As we mentioned above, the Illinois Department of Nuclear Safety inspected Amersham's facility following Eltzroth's complaint and concluded:

During a demonstration of the seed inspection procedure, the licensee was found to be using appropriate shielding to ensure that doses were well within the limits found in the regulations and the license. A review of personnel dosimetry records confirmed that no employees received doses above any regulatory or administrative limits.

RX 1 at 2. The ALJ found "the report submitted pursuant to the IDNS investigation reflects that the task for which [Eltzroth] was hired was indeed in conformity with [regulatory] requirements." R. D. and O. at 14.

Moreover, Zdunek testified without contradiction that since he had become Radiation Safety Officer in 1991 no Amersham employee performing any function in the facility had received a radiation dose in excess of regulatory limits, and that the technicians who inspected the I-125 seeds received some of the lowest radiation levels in the facility. Tr. at 51, 54.

Supervisor Wronkiewicz talked with Eltzroth on the afternoon of February 4:

. . . I basically, you know, tried to alleviate his fears and answer his questions as to the dosage he was actually receiving. Briefly went over the process with him again, explaining that at any one time, we generally inspect ten to 30 seeds, depending on the activity of the seeds. Higher activity seeds, we inspect fewer seeds at a time. Lower activity seeds, we could put 30 seeds out there.

Tr. 125. Wronkiewicz also described his February 4 conversation with Eltzroth in a contemporaneous memorandum:

. . . Ted [Eltzroth] said he had determined that the procedure required him to receive too high of a dose from photons emitted from the I-125, and he did not want to perform the test unless other arrangements could be made for him. I explained and demonstrated to Ted at that time that sufficient shielding was in place to protect his legs, body and head from most of the detectable field from the I-125 Seeds. I also explained that the leaded gloves offered sufficient shielding in the 28 keV and 35.5 keV energy ranges to limit the exposures to extremely low dosage levels. In addition I reminded Ted that we also limit the number of seeds we inspect at any one time to 10 to 30 seeds, to further limit our exposure.

RX 3 at 4.

The next morning, February 5, Radiation Safety Officer Zdunek also spoke with Eltzroth:

A. Mr. Eltzroth came in and I had told him that I was informed that he had some concerns -- specific concerns working with radioactive material and radiation and the exposure he might receive. . . . I asked him to -- if he could elicit what his specific concerns were. And he indicated that there were just too many transformations. . . . Then he asked whether or not we -- he could use heavier leaded gloves to work with the seeds. . . . I did tell him at that time that if he found something, a better leaded glove, please bring it to our attention, we'd be more than happy to look at it and see if it would work in the situation. . . . Then I -- I explained the regulatory agencies, their limits, the Amersham limits and the ALARA limits. . . . I did talk to him a little bit about the instrumentation back there in. . . . He said he had monitored the seeds with the instrument back there. . . . That instrument is designed -- it's designed for environmental monitoring. Very,

very, low -- low dose -- not dose rates, contamination. . . . I did mention the NCRP and the ICRP limits that discuss the -- the recommendations that Amersham was going to comply with those. . . . And I also offered him documentation on biological effects and other materials that I had available at that time if he wanted to review it to show that there was no significant risk from the amount of exposure he would be exposed to.

Q. Okay. Did he express any interest in looking at those materials?

A. No, he did not.

Q. Okay. What were you trying to accomplish in this whole meeting? I mean what was your -- your hope that would come out of it?

A. My hope was to -- hope that he would understand that we do have appropriate means in place to protect the individual from exposure to -- exposure to . . . radiation and that we can monitor their exposures and that he would be more comfortable with working with the materials.

Tr. 65-69.

Zdunek's contemporaneous memorandum is consistent with this testimony:

I told [Eltzroth] that I had been informed he might have some concerns about the radiation exposure with working with the seeds. I asked what his specific concerns were and I would try to address those items. He said that he checked the seeds back there and there were too many transformations. I inquired what he meant by too many. He just [said] there were too many. He also then asked for other heavier leaded gloves to work with the seeds. I indicated that we looked into other gloves and the next model that we could find were too heavy and cumbersome to do the job effectively. I also indicated that the gloves that were available stopped enough of the radiation to reduce the dose to the operator to well within all regulatory limits. I then proceeded to explain the limits the regulatory agencies use and the Amersham limits which are lower. I discussed the ALARA policy which has also set even lower guidelines for the department that he was working in. He said that other things could be done to reduce the dose even farther. I agreed but we also have to look at the cost vs benefit aspect of the

ALARA principle. The whole body dose for the operation in question is not measurable by any means and the extremity dose is very low in relation to the regulatory limits. I said that I try to focus my efforts on dose reduction to the areas that provide the higher levels of concern and work to reduce doses in those areas. I also said that if he found any gloves that were heavier or had any ideas for improvement we would look at those and determine if they are feasible. I also explained that there are technical groups that review exposure limits like the NCRP and the ICRP which were the ones that have helped to determine what the regulatory limits are. I offered documentation on biological effects and other materials that might better explain that the levels that he would be working with would not pose any significant risk. He did not request any of that information[.]

RX 3 at 1.

That afternoon Wronkiewicz spoke to Eltzroth again:

A. . . . When I came in, I once again went over his concerns. Once again reminded him that, you know, based on our historical data for technicians working with the material doing that procedure that we had found it to be well within the limits. Reminded him once again that it was part of his duties that he accepted when he accepted the position. And then, you know, basically -- you know, said it's up to you, you know, whether or no -- whether or not you want to do that test. I can't force you to do it. But that is part of the job responsibilities. And . . .

Q. At that point did he indicate that he was then willing to do the job or . . .

A. He said he wanted to think about it overnight again.

Q. Okay. Did he in that conversation on that third day tell you that there would be any circumstances under which he would do the job?

A. He wanted -- he wanted his exposure reduced to zero.

Q. That's what he said to you?

A. Yes.

Tr. at 127-128.

Wronkiewicz's contemporaneous memorandum is consistent with this testimony:

I then ask[ed] Ted if he had made a decision as to accepting all job assignments for this position, including the I-125 Seeds inspection. Ted informed me that unless special arrangements were made "to reduce his exposure to 0," he would not work in the production area and perform that test. I told him that it was unreasonable for him to ask for restricted duty, especially in view that there were three other technicians besides myself who were performing the same test, with doses far below the IDNS's limits. He said he didn't care what type of documentation existed, he felt that Amersham was not taking all proper precautions to protect him, and he personally would not perform that test with out arrangements for additional shielding for him. I once again ask[ed] him to decide if he wanted to continue to work for Amersham/Medi-Physics under the conditions he agreed to accept. He once again said he "had to think about [it] and would let me know the next day." . . . [After discussing the matter with other Amersham officials] I then went back and informed Ted that we had gone as far as we could in addressing and accommodating his concerns, and it was our opinion that he was not going to be comfortable handling radioactive sources. I told him that since he was well aware of what the duties of this position were when the job offer was made, and since he had continued to refuse job assignments which he agreed upon when he accepted the position, we were immediately terminating his employment. Ted said that he should be given more time to think about it. Which I said I couldn't give him.

RX 3 at 5.^{11/}

Thus, Amersham officials tried to show Eltzroth that Amersham adhered to federal, state, and company radiation exposure limits; to explain the protections afforded, including shielding and gloves; and to clarify that Eltzroth's glove test was not accurate because he used inappropriate equipment. In the circumstances of this case these actions were sufficient to fulfill Amersham's duty to respond to Eltzroth's good faith work refusal. As the ALJ held:

^{11/} Eltzroth's testimony regarding these meetings does not contradict that of Wronkiewicz or Zdunek. See Tr. 13-15, 25-26, 30-31.

[T]he unchallenged testimony regarding the reactions of the supervisor, safety officer and trainer to Mr. Eltzroth's expression of concern support Respondent's rationale for the discharge. . . . Complainant's concerns were directly addressed; attempts were made to assuage his fears, he was reminded of the reason he was hired, and, upon his expression of reluctance, was discharged.

R. D. and O. at 14.

However, we need not rest our decision on these facts alone, because it is uncontroverted that in his February 5 meeting with Wronkiewicz Eltzroth declared that he would continue to refuse to inspect I-125 seeds unless his exposure to radiation was reduced to zero. RX 3 at 5; Tr.128; *See* R. D. and O. at 14. Federal and State regulations limit levels of radiation to which employees may be exposed. However, none of these regulations require that an employee work in a radiation-free environment. *See, e.g.*, 29 C.F.R. §1910.1096(b) (1998); 10 C.F.R Part 20 (1998); 32 Ill. Admin. Code §340.210(a). When Eltzroth demanded a "zero exposure" environment, his work refusal lost its basis as reasonable and in good faith.^{12/} At that point Eltzroth's work refusal fell outside the scope of activity protected under the ERA, and any obligation Amersham had to attempt to allay Eltzroth's fears ceased.^{13/}

CONCLUSION

For the foregoing reasons, we agree with the ALJ's conclusion that Amersham did not violate the ERA in discharging Eltzroth from employment. Accordingly, this case is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

Member E. Cooper Brown, dissenting.

^{12/} Contrary to assertions of the dissent, we find nothing in the record which would support a conclusion that Eltzroth's insistence on a position with no exposure to radiation was prompted by frustration.

^{13/} Eltzroth had an opportunity at hearing to explain his insistence on a radiation-free work environment. He did not do so.

I dissent from the majority, as I am of the opinion that the complainant in this action, Mr. Eltzroth, was wrongfully discharged for engaging in activity protected under Section 211 of the Energy Reorganization Act of 1974 (“ERA”), 42 U.S.C. §5851. Based upon my review of the record, I am persuaded that Eltzroth was discharged for refusing to perform work which he reasonably and in good faith believed posed an unsafe and potentially hazardous condition. Such a refusal to work is protected activity under the ERA. Given the failure of Eltzroth’s employer, Respondent herein, to properly investigate and adequately explain the perceived hazard upon being notified thereof by Eltzroth, I do not find that this protected status was lost.

As the majority opinion notes, the ALJ properly found that Eltzroth engaged in two forms of “protected activity” within the meaning of Section 211 of the ERA: (1) Eltzroth’s expression of concern to his employer about the potentially dangerous nature of his work;^{1/} and (2) his refusal to work in what he considered a potentially dangerous work environment.^{2/} See R. D. & O., pp. 9-11.

As to both protected activities, the ALJ concluded that Eltzroth satisfied the elements necessary for establishing a *prima facie* case of retaliatory action by his employer: (1) that Eltzroth engaged in protected activity; (2) that Respondent was aware of Eltzroth’s protected activity; (3) that Respondent effected an “adverse act” upon Eltzroth; and (4) that Eltzroth “presented evidence sufficient to raise the inference that the adverse action occurred as a result of his protected activity.” R. D. & O. at 11-12.

The ALJ then turned to the ultimate question of whether Eltzroth “proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” R. D. & O. at 12.^{3/} The ALJ examined the record to determine whether the Respondent had produced any evidence of a legitimate, nondiscriminatory reason for the adverse action against Eltzroth, concluding that Respondent produced evidence sufficient to find that Eltzroth was not terminated for having raised safety concerns with his employer, but for refusing to perform the work for which he was hired. R. D. & O. at 13-15. The majority opinion joins the ALJ in both of these conclusions, explaining that although Eltzroth’s refusal to work was protected initially, the protection was subsequently lost.

^{1/} For discussion of internal complaints as “protected activity,” see *Stockdill v. Catalytic Industrial Maintenance*, 90-ERA-43, Sec’y D. & O. (Jan. 14, 1996); *Dobreuenaski v. A.U.I.*, 96-ERA-44, ARB Case No. 97-125 (June 18, 1998).

^{2/} For discussion of refusal to engage in hazardous work as “protected activity,” see *Pensyl v. Catalytic, Inc.*, 83-ERA-2, Sec’y D. & O. (Jan. 13, 1984); *Blackburn v. Metric Constructors*, 86-ERA-4, Sec’y D. & O. (June 21, 1988).

^{3/} As the majority opinion correctly notes, once the Respondent produces evidence demonstrating that the complainant was subjected to adverse action for a legitimate, non-discriminatory reason, the relevant inquiry becomes whether complainant can prevail on the ultimate question of liability. See *Carroll v. U.S. Dep’t of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

I agree that Eltzroth was not fired for raising safety concerns, and thus I agree with the majority's resolution of the first of the foregoing issues. I also agree that Eltzroth was fired for refusing to perform the work for which he was hired. However, I do not agree that this work refusal, which was based upon Eltzroth's reasonable belief of the existence of an unsafe working condition, lost its protected nature under the ERA. Thus, I would hold for Eltzroth in this regard, and therefore dissent from the majority opinion.

DISCUSSION

In *Pensyl v. Catalytic, Inc.*, 83-ERA-2, Sec'y D. & O. (Jan. 13, 1984), the Secretary of Labor articulated the protection to be afforded an employee under the ERA where the employee refuses to work because of his or her belief that working conditions are unsafe or unhealthful. In such circumstances, where the employee's belief is found to be reasonable and raised in good faith, the refusal to work is considered protected activity unless and until "the perceived hazard has been investigated by responsible management officials and government inspectors, if appropriate, and if found safe, adequately explained to the employee." *Pensyl*, slip op. at 6-7.

A. The Nature of Eltzroth's Concern

Eltzroth had two basic concerns about his work: (1) the actual radiation doses emanating from the I-125 seeds, and (2) actual exposure levels resulting to his unshielded forearms. Tr. 29. Having been trained on the seed inspection procedure, Eltzroth initiated his seed inspection by first inserting a radiation detection device into his glove, concluding by so doing that "there was little to no protection from the glove." Tr. 12. Immediately upon bringing his concern to the attention of the individual who had trained him in the seed inspection procedure, Judy Graney, they used another pair of gloves, performed the same test, and found that the second pair had "no effect either." *Id.* Stated Eltzroth: "So, that was the nature of the problem that led me to question the process. I wanted to know exactly what the radiation rates from the sample were at that point." *Id.* Eltzroth further testified that at the time he also asked Graney, "what is the amount of radiation off this source? And well, obviously Judy didn't know. . . . She referred me to the radiation safety officer, Ed Zdunek." Tr. 13.

At his meeting the next day with Mr. Zdunek, Eltzroth told him that he "had done some preliminary calculations the night before and found that the rates were pretty significant off this source. And I had asked [Zdunek] if he knew what the actual numbers were and how to get those results." Tr. 13.

Eltzroth subsequently met with his supervisor, Ray Wronkiewicz. They returned to the work site and laid eight pair of gloves on top of radiation monitor. Eltzroth described the

covering of gloves as having “little or no effect” and confirming “what I thought was . . . the radiation rates were too high from there.” Tr. 14.

As Eltzroth explained to the ALJ, he was concerned “that the amount of radiation to an unexposed [sic] body part in the field is going to exceed federal limits in very short order.” He was especially concerned about the exposure levels to his unshielded forearms. Tr. 29.

The ALJ concluded that Eltzroth’s belief that his working conditions were unsafe was reasonable and raised in good faith.^{4/} In support thereof, the ALJ cited: (1) “the tenor of complainant’s testimony,” (2) the fact that Respondent’s safety officer, Zdunek, “believed complainant to have been genuinely concerned about the issue,” (3) “the brief one-day training [Eltzroth] had undergone,” (4) “the paucity of [Eltzroth’s] experience” at that point, (5) “the measurement of the radiation detector,” (6) the reaction of Graney (Respondent’s employee who trained Eltzroth), which the ALJ felt “lends credence to the reasonableness of [Eltzroth’s] belief as to the presence of a hazardous condition,” and (7) Eltzroth’s supervisor’s reaction, which the ALJ felt similarly supported the legitimacy of Eltzroth’s concern. R. D. & O. pp. 10-11.

I find nothing in the record that contradicts or undermines the ALJ’s conclusion regarding Eltzroth’s concerns.^{5/} Indeed, further examination of the record regarding the potential radiation hazard posed by the I-125 seeds lends even greater support to the ALJ’s findings and conclusion on this point. Eltzroth’s concerns about the radiation field generated by the seeds primarily focused on the radiation resulting from a tray of 80 seeds,^{6/} which

^{4/} “Whether the belief is reasonable depends on the knowledge available to a reasonable person in the circumstances with the employee’s training and experience.” *Stockdill, supra*, slip op. at 2; *Pensyl*, slip op. at 7.

^{5/} If anything, I would add to the ALJ’s findings the fact of Eltzroth’s educational background in physics, including his teaching thereof at the community college level prior to going to work for Respondent. Tr. 10. As Eltzroth stated at the hearing, “My background in physics, while not specifically in radiation, taught me enough to know that I had to be careful in dealing with radioactivity.” Tr. 12. Indeed, Eltzroth’s ability to do rough dose calculations for the I-125 actually increased his concern. Tr. 17.

^{6/} At the time Eltzroth conducted his initial I-125 inspection, he had poured out 80 seeds for inspection. Eltzroth testified that he poured out 80 seeds, “the whole batch,” because when initially shown how to do the inspection, they had used a batch of 80 seeds. Eltzroth further mentioned that 80 seeds was considered a “normal check,” Tr. 40-41, an assertion corroborated by the individual who trained Eltzroth in the seed inspection process. See memo to file of J. Graney, at Respondent’s Exhibit 3.

Eltzroth calculated generated a radiation field of approximately 1.4 rads per hour. Tr. 16.^{7/}
Eltzroth was also concerned about the accuracy of the film badge

^{7/} It is true, as the majority points out, that Eltzroth testified that his dose calculations were theoretical, rather than based on actual measurements. Nevertheless, under questioning at hearing, Respondent's radiation safety officer agreed that Eltzroth's calculations could reflect actual exposure rates within the immediate work area of the seeds -- provided a sufficient number of seeds were in the batch. Tr. 89; 100-101.

dosimeters that were used to monitor the workers, thus leading to his testing the radiation field by placing the radiation monitor in his glove.^{8/}

As to whether the worker's bared forearms would or could be subjected to the radiation field generated by the I-125 seeds, Zdunek stated that "the hands are the parts of the body that are constantly in the radiation field, not the forearm," and that the farther removed from the source, the less the exposure. Yet, Zdunek acknowledged that the forearm would periodically cross over or through the radiation field during the process of examination and testing (Tr. 76, 80) and that, as a result, an employee's forearm could receive a radiation dose of 100 millirem in a 15 minute period, depending on the number of I-125 seeds in the tray. Tr. 90.^{9/}

In defense, Respondent's officials repeatedly, throughout the hearing before the ALJ, asserted that the higher doses were not a concern because the proper and normal I-125 inspection entailed the examination of not more than 30 seeds at any one time. Respondent's safety officer described Eltzroth's job as examining 10 to 30 seeds. Tr. 49. Asked later in the hearing to describe the standard inspection procedure, Zdunek again stated, "The procedure taught to people is to pour out ten to 30 seeds." Tr. 73. Wronkiewicz also testified that, "at any one time, we generally inspect ten to 30 seeds." Tr. 125.^{10/}

In my view, Respondent's testimony at hearing before the ALJ concerning "standard operating procedure" was less than candid. Eltzroth testified that at the time of his initial instruction, Graney (his trainer on the seeds inspection process) had mentioned to him that the measurement and inspection of 10 to 30 seeds at a time was "an alternative" process, rather than "typical." Tr. 39. A "memo to file" by Graney, attached as part of Respondent's Exhibit 3, corroborates Eltzroth's testimony in this regard. Graney explained in her memo the application of "Mil. Std. Testing" as it pertained to the I-125 seed inspection that Eltzroth was to undertake: "Reduced testing," Graney's memo states, consists of 32 seeds per lot.

^{8/} Eltzroth testified that he understood that the film badges were not 100% accurate. Tr. 26-27. Respondent's safety officer, Zdunek, testified that the film badge readings could be off in accuracy anywhere from 10% to 20%. Tr. 94-95.

^{9/} Eltzroth testified that the inspection process for a batch of seeds required about 15 minutes, Tr. 17, and Graney's memo to file indicates that on the second day of Eltzroth's employment, she tested two batches of 80 seeds each in one hour. Respondent's Exhibit 3. Thus, based on Zdunek's testimony of 100 mrem to the forearm per seed inspection, and assuming, conservatively, one seed inspection per hour, by the end of three months, the cumulative exposure to a worker's forearms could exceed the annual dose limit of 50 rems, which Zdunek had stated was the regulatory limit, or within five months exceed the 75 rems per year OSHA limit referenced in the majority opinion.

^{10/} Wronkiewicz's "Activity Report" indicates that the supervisor informed Eltzroth that "we . . . limit the number of seeds we inspect at any one time to 10 to 30 seeds." See Respondent's Exhibit 3.

Graney's memo notes that on the first day of training, after having run a test with only 32 seeds, "this lot failed the diameter spec which meant the next 10 lots had to be under normal inspection (80 seeds per lot accept 0 reject 1)." Graney's memo to file, at Respondent's Exhibit 3 (*emphasis added*). In the afternoon, Graney's memo continues, Eltzroth proceeded to test the next batch -- consisting again of 80 seeds. It was at this time that Eltzroth placed a radiation monitor in the glove, getting a reading of "500 cpm at 1000X setting." When Eltzroth showed this to Graney, according to her memo, she used a different pair of gloves, and got the same result. *Id.* The memo concludes by noting that Graney then tested two more lots of 80 seeds each before they called it quits for the day.^{11/}

The foregoing demonstrates that Eltzroth's rad-safe concerns based on the more intense radiation field generated by I-125 inspection runs of 80 seeds was justified.^{12/} Moreover, because Respondent's sole means of determining dose to Eltzroth's bared forearms was a ring film badge, which not only was worn under a protective glove but could not be interpreted absent sending it out to another company for a delayed reading, Tr. 53, it was quite reasonable for Eltzroth to have sought a "second opinion" regarding actual radiation levels by inserting the radiation monitor into his glove. It was even more reasonable of Eltzroth to subsequently insist upon some form of interpretative investigation by management of the radiation levels into which he was placing his unprotected arms, particularly after he had done his own admittedly rough, yet relatively reasonable,^{13/} dose calculations.

^{11/} Graney's account of the process is also consistent with information found in Respondent's Exhibit 4, consisting of a copy of the "Mil. Std. Training Quiz" which had been administered to Eltzroth as part of his training. At page 2 thereof, the following question (and Eltzroth's apparently approved answer) is found: "*When reduced inspection is in effect, normal inspection shall be instituted if 1 lot/lots is/are rejected. 10 lots have to be accepted (or pass specification) under normal inspection before reduced inspection can again be instituted.*"

^{12/} I also deduce from the record that Respondent's calibration of the I-125 radiation field to NRC-acceptable safety levels was based on the radiation generated from 10 to 20 seeds, rather than the 80-seed "normal" inspection of concern to Eltzroth. Tr. 83. This, coupled with their testimony before the ALJ as to what constituted a "normal" seed inspection, draws into question both Zdunek's and Wronkiewicz's credibility on the witness stand.

^{13/} See n. 9, *supra*, and accompanying text.

B. Whether the Reasonableness of Eltzroth's Concern was Lost?

The majority concludes that Eltzroth's refusal to work lost its protected status when, as Wronkiewicz testified, Eltzroth subsequently demanded a "zero radiation exposure" environment in which to work. I have difficulty with the majority's conclusion in this regard for at least two reasons.

First, I am not as convinced as is the majority that the record supports a finding that Eltzroth demanded "zero exposure." Respondent's claim is that Eltzroth's employment was terminated because he unjustifiably refused to perform an essential function of his job. Tr. 7. Wronkiewicz (Eltzroth's supervisor) testified that by the third day of his employment and just prior to terminating him, Eltzroth informed him that, in order to continue to work on the assigned job, "He wanted his exposure reduced to zero." Tr. 128. *See also* Wronkiewicz's Activity Report, at Respondent's Exhibit 3. Eltzroth acknowledged that had he gone ahead and performed the seeds inspection work, he would not have been fired. Tr. 38. However, he disagreed with the contention that he was fired for refusal to perform the work. Tr. 34. In his opening testimony to the ALJ, Eltzroth stated, "I refused to perform an unsafe function." Tr. 31. Similarly, in his closing presentation to the ALJ, Eltzroth argued, "[T]his isn't an issue of me not wanting to do the job, Your Honor. It was a genuine concern about the safety issues." Tr. 133.

Indeed, Respondent's acknowledgment of Eltzroth's several requests for more time to "think about it" (when pressed for an answer as to whether he would do the work or not), would seem to discount Respondent's contention that Eltzroth would only work if the task could be undertaken in a "zero exposure" environment. For example, Wronkiewicz acknowledged that on the third day of his employment (the day Eltzroth was terminated), "he [Eltzroth] said he wanted to think about it overnight again" in response to the supervisor's question as to what Eltzroth had finally decided. Tr. 127. Although the supervisor testified that he did not recall Eltzroth asking for the additional time in order to verify his radiation calculations before making his decision (as Eltzroth had testified), the supervisor nonetheless testified that he did recall Eltzroth stating that he wanted more time "to think about it." Tr. 131.^{14/}

Yet even if the record can be said to support the finding that Eltzroth ultimately demanded a "zero exposure" working environment, I do not construe *Pensyl v. Catalytic, Inc.*

^{14/} Wronkiewicz's Activity Report notes that at the end of day two, and again on day three, after listening to Respondent's explanations, Eltzroth asked in each instance for more time to think about the matter. Indeed, on day three Eltzroth made this request twice, just prior to Respondent's decision to terminate, when Eltzroth "once again said he 'had to think about [it] and would let me know the next day'" and, again, upon subsequently being notified of his termination. Wronkiewicz's report, at Respondent's Exhibit 3.

to mean that Eltzroth's "demand," occurring when it is reported to have been made, necessarily negated the protection afforded his refusal to work by the ERA. I am of the opinion, based on my review of the record as a whole, that Eltzroth's "demand" was little more than an after-the-fact expression of frustration resulting from his inability to get straight answers from his employer to legitimate and straight-forward safety concerns that had been raised in good faith.

C. The Adequacy of Amersham's Response to Eltzroth's Concerns

A thorough analysis of the record, in light of *Pensyl* and subsequent Secretarial and ARB decisions, leads to the inescapable conclusion that, as a matter of law, Eltzroth was wrongfully terminated in violation of the protections afforded under Section 211 of the ERA.

(1) Amersham's Response

Management's initial response to Eltzroth's concern was one of surprise. Eltzroth testified that, "[Judy Graney] was surprised that the glove had not protected - or had not shielded the radiation." Tr. 12. When a subsequent "eight-glove" coverup of the radiation monitor was attempted by Eltzroth's supervisor (in an apparent test of the effectiveness of the protective gloves) and failed, Eltzroth testified that his supervisor stated, "you know, that was kind of interesting." Tr. 14.

Eltzroth testified that at the meeting with Respondent's safety officer, Zdunek "explained to me what their process was - for monitoring the radioactivity of the sources and the exposure to their people. . . . I had done some preliminary calculations the night before and found that the rates were pretty significant off this source. And I had asked him if he knew what the actual numbers were and how to get those results. And he had said that they don't do it that way. They use badges - nuclear emulsion badges to monitor the exposure." Tr. 13. Zdunek offered to show Eltzroth historical data, but Eltzroth stated he was not interested, that he "wanted to verify my numbers with a more qualified source to make the calculation." *Id.*

Zdunek gave a similar account of this meeting. According to the safety officer, upon meeting with Eltzroth they discussed possible use of heavier leaded gloves, which Zdunek explained was not possible. Zdunek "explained the regulatory agencies, their limits, the Amersham limits and the ALARA limits." Tr. 66-68. Zdunek also mentioned that he talked to Eltzroth "a little bit about the instrumentation" that Eltzroth had used to determine radiation exposure.^{15/} Finally, Zdunek mentioned the NCRP and ICRP limits, and how

^{15/} Beyond this, I found nothing in the record to indicate that, at the time he raised his concerns, Eltzroth received the full and detailed explanation given by Respondent to the ALJ as to the nature of, (continued...)

Amersham was in compliance therewith. *Id.* Zdunek testified that his hope was to get Eltzroth to understand that they had “appropriate means in place to protect the individual from exposure to radiation” which could be monitored. Tr. 69. *See also* Zdunek’s “Memo to File,” at Respondent’s Exhibit 3.^{16/}

Eltzroth subsequently met with Wronkiewicz. Together they went back to the work site. As previously mentioned, they laid eight pair of gloves on top of the radiation monitor, “to little or no effect” according to Eltzroth. Tr.14. Concerning his discussion at this time with Eltzroth, Wronkiewicz testified,

I basically, you know, tried to alleviate his fears and answer his questions as to the dosage he was actually receiving. Briefly went over the process with him again, explaining that at any one time, we generally inspect ten to 30 seeds, depending on the activity of the seeds. Higher activity seeds, we inspect fewer seeds at a time. Lower activity seeds, we could put 30 seeds out there. Tr. 125.^{17/}

Wronkiewicz testified that at the conclusion to their discussion on day two of Eltzroth’s employment, “He [Eltzroth] was still unwilling to perform the seeds function. At that time, I reminded him that it was part of his duties that he agreed to when he accepted the position. I basically, you know, told him that it - it was up to him whether or not he wanted to perform that function.” Tr.125. “He requested time to think about it but gave no indication whether or not he would perform the function in the future.” Wronkiewicz concluded the meeting by suggesting that Eltzroth meet again the next day with Zdunek, who “would be able to present data - historical data that we had plus other reference data as to exposure - allowable exposure limits and things of that nature.” Tr.126.

^{15/}(...continued)

and limitations to, the radiation monitoring device upon which Eltzroth had relied.

^{16/} Wronkiewicz, Eltzroth’s supervisor, characterized Zdunek’s response as having “tried to explain to him [Eltzroth] using historical data and other types of reference material that the procedure was safe and well within the limits.” Tr. 128. (Emphasis added).

^{17/} Wronkiewicz’s contemporaneously prepared “Activity Report” states that the supervisor, in response to Eltzroth’s concerns, “explained and demonstrated to Ted at that time that sufficient shielding was in place to protect his legs, body and head from most of the detectable field from the I-125 seeds. I also explained that the leaded gloves offered sufficient shielding in the 28 keV and 35.5 keV energy ranges to limit the exposure to extremely low dosage levels. In addition, I reminded Ted that we also limit the number of seeds we inspect at any one time to 10 to 30 seeds, to further limit our exposure.” Wronkiewicz’s Report, at Respondent’s Exhibit 3.

The next day (day three of Eltzroth's employment), the supervisor essentially repeated himself to Eltzroth:

When I came in, I once again went over [with Eltzroth] his concerns. Once again reminded him that . . . based on our historical data for technicians working with the material doing that procedure that we had found it to be well within the limits. Reminded him once again that it was part of his duties that he accepted when he accepted the position. And then . . . basically - said it's up to you . . . whether or not you want to do that test. I can't force you to do it. But that is part of the job responsibilities.

Tr. 127.

The majority opinion finds that after Eltzroth's initial refusal to work, Respondent "made significant efforts to investigate and to explain the safety of the work area to Eltzroth." However, what the record (both that cited above and that cited by the majority) demonstrates is, as the ALJ found, there was no investigation of Eltzroth's concerns, and little offered by way of explanation specifically addressed to those concerns.

Efforts [by Respondent] appear to have been made to calm complainant's fears. However, there is no indication in the record that an investigation was undertaken, other than a repeat of the detector-glove test, which obviously did not dispel the concern. Additionally, the explanation to complainant was lacking, in part because little inquiry went into the matter, and in part because his concern was addressed with data that did not answer his question, since the badges did not measure the radiation dosage of the occasionally exposed forearm.

R. D. & O. at 11.

(2) Pensyl and its Progeny

In remanding the case in *Pensyl* for a determination of whether the employer had properly fulfilled its obligations to investigate and explain, the Secretary cited three areas of concern requiring scrutiny: (a) the nature of the investigation undertaken once the concern of potential hazard is raised; (b) the results of the investigation and how those results are communicated to the employee; and (c) how the employer otherwise responds to the employee's concerns, including the nature of any counseling afforded the concerned employee. *Pensyl*, slip op. at 7-8.

Consistent with the analysis of *Pensyl*, the Secretary has held that the employer's response was adequate, and thus that the employee's work refusal for safety reasons was no longer protected activity, where appropriate management personnel investigated the employee's specific concerns and, after finding the perceived danger nonexistent, satisfactorily communicated those findings to the employee. For example, in holding for the employer in *Stockdill v. Catalytic Industrial Maintenance*, 90-ERA-43, Sec'y D. & O. (Jan. 24, 1996), the Secretary found that management, in response to the employee's concerns, checked appropriate air samples for levels of contamination, which was corroborated by further air quality analysis by other company officials. The results of the investigation were, in turn, sufficiently explained to the employee such that the employer "had no further indication of why complainant was still refusing to work, as complainant did not at that time state that he wanted to see test results or why he did not believe Respondent's evaluation of the work area." *Stockdill*, slip op. at 4-5.^{18/} In *Smith v. Catalytic, Inc.*, 86-ERA-23, Sec'y D. & O. (March, 18, 1988), the Secretary not only determined that the employee "did not have a good faith reasonable belief that the working conditions were unsafe or unhealthful," but that "responsible management officials perceived the potential hazard, investigated it, and adequately explained it to the employees, including the complainant." *Smith*, slip op. at 2.

At the same time, the Secretary has not held the employer to such a rigorous standard of investigation and explanation where the employee's safety concerns proved too general or vague. In *Wilson v. Bechtel Construction*, 86-ERA-34, Sec'y D. & O. (Feb. 9, 1988), the complainant had failed to articulate specific safety reasons at the time for not wanting to undertake an assignment.^{19/} The Secretary held that, "to the extent complainant actually raised safety questions with his supervisors, they were adequately responded to under *Pensyl*, given the general and often ambiguous nature of his questions." *Wilson*, slip op. at 9. In light of the dearth of safety questions raised, the response by his supervisor and a health physics specialist to the few that were, and the fact that the complainant was well aware of the various procedures available to him for raising any safety concerns that he had, the Secretary concluded that, "Respondent could reasonably have believed it had adequately responded to Complainant's safety concerns." *Id.*, slip op. at 12.

On the other hand, the Secretary has found for the employee where no investigation of an employee's protected safety concerns was undertaken or where the concerns were otherwise inadequately addressed by the respondent. In *Blackburn v. Metric Constructors*,

^{18/} Given the facts of the instant action, it is also relevant to note the Secretary's concluding admonishment that, "Had Complainant inquired further or had he more expertise or knowledge of contamination prevention . . . , Respondent might have been required to further explain and display the safety of complainant's work area." *Stockdill*, slip op. at 4-5 (*emphasis added*).

^{19/} Concerns subsequently raised at hearing before the ALJ appear to have been largely kept by the complainant to himself at the time of his refusal to undertake the work assignment. *Wilson*, slip op. at 5-9.

86-ERA-4, Sec’y D. & O. (June 21, 1988), the Secretary concluded that although the respondent’s witnesses testified as to the company’s procedures for maintaining safe working conditions, “they did not explain what if anything was done to investigate complainant’s safety concerns or to allay his fears” at the time his concerns were first raised. Thus, the Secretary concluded, “there were no steps taken by respondent which, under *Pensyl*, would have caused the loss of [complainant’s] protection.” *Blackburn*, slip op. at 15. See also *Tritt v. Fluor Constructors*, 88-ERA-29, Sec’y D. & O. (August 25, 1993).

Where specific safety concerns are raised, review of an employer’s safety procedures and mere assurances of safety by management are not enough. “[A]ctual safety is not the relevant issue at this point. Rather, the pertinent issues are whether complainant had a reasonable, good faith belief that conditions were unsafe, and whether respondent provided sufficient information to dispel these concerns and adequately explained the safety issues raised.” *Van Beck v. Daniel Construction*, 86-ERA-26, Sec’y D. & O., slip op. at 4 (Aug. 3, 1993).^{20/}

At the same time, an employer will not be required to do more than is reasonable under the circumstances. Thus, in *Dobreuenaski v. Associated Universities*, ARB Case No. 97-125, ALJ Case No. 96-ERA-44 (June 18, 1998), the ARB refused to afford an employee’s work refusal protection under *Pensyl* where the employer’s “extensive and good-faith efforts” to convince the claimant that his assignments were safe proved unavailing only because they “were rebuffed by [claimant’s] obduracy.” *Dobreuenaski*, slip op. at 12.

Conclusion

That Amersham’s response was inadequate and insufficient to meet the requirements of *Pensyl* should be self-evident from the foregoing. Unlike the situation in *Wilson v. Bechtel*, *supra*, Eltzroth articulated at the time specific safety concerns for refusing to continue the work assignment. Thus, more was required of Respondent than its mere attempt to calm complainant’s fears with assurances of compliance with regulatory guidelines and citation to historical data unresponsive to Eltzroth’s specific questions. *Van Beck v. Daniel Construction*, *supra*; *Blackburn v. Metric Construction*, *supra*. Required of Respondent was

^{20/} In *Van Beck*, the Secretary noted that the evidence submitted by the respondent at hearing in support of its claim of safety actually cut against respondent’s case, as such evidence suggested that at the time claimants’ concerns were first raised, “respondent had sufficient information in its possession to adequately explain [the] perceived safety concerns to their employees.” *Van Beck*, slip op. at 4. Cf. Transcript, pp. 74, 80-81 (testimony suggesting that Respondent Amersham could have measured the radiation field of concern to Eltzroth).

the type of investigation undertaken by management in *Stockdill v. Catalytic Industrial Maintenance, supra*, and *Smith v. Catalytic, supra*.^{21/}

Moreover, not only was no investigation undertaken of Eltzroth's safety concerns, it should have been clear to Respondent that what little explanation its management and safety officer offered failed miserably to allay Eltzroth's concerns. Unlike the situation in *Wilson v. Bechtel* and *Stockdill, supra*, Respondent had no basis upon which to reasonably conclude that Eltzroth's concerns had been satisfactorily addressed. Eltzroth's reaction to his employer's response was one of genuine and obvious unease and uncertainty, which alone should have put Respondent on notice that more was required. The uncontroverted testimony at hearing before the ALJ, by Eltzroth and Respondent's witnesses, was that after receiving an explanation from one management official or another, Eltzroth indicated in every instance that he still felt "uncomfortable," that he wanted to study the matter further, that he "needed more time" to think about the situation. *See e.g.* Transcript, pg. 14; *see* footnote 14 *supra*, and accompanying text.^{22/}

As the Secretary made clear in *Tritt v. Fluor Constructors, supra*, once an employee raises a reasonable, good-faith safety-based reason for refusing to work, the employer is under an obligation to both "do an investigation and provide an adequate explanation" to the employee. Slip op. at 8-9. In the instant case, I agree with the ALJ's findings (R. D. & O. at 11) that no such investigation was undertaken, and that the explanation offered was clearly lacking. Had Eltzroth raised the "zero radiation exposure" demand earlier, particularly had he made such a demand at the time he initially raised his safety concerns, I would have agreed that Eltzroth's work refusal was not based on a reasonable, good-faith concern as to his safety, and thus would have joined in the majority's opinion. However, where Eltzroth's "zero exposure" demand (assuming such a demand occurred) was raised subsequent to a clearly inadequate response and no investigation by Respondent, I refuse to hold that Eltzroth's "demand" removed his work refusal from the protections afforded under Section 211 of the ERA.

Indeed, my greatest concern with the basis for the majority opinion issued herein is that it offers too convenient an avenue around the protections to be afforded an employee who refuses a work assignment due to a reasonable, good-faith safety concern. In light of the majority's holding, all an employer need do in order to defeat *Pensyl, supra*, is evade its obligation to investigate and satisfactorily explain the employee's safety concerns just long

^{21/} Indeed, given the Secretary's admonishment in *Stockdill* (*see* footnote 18, *supra*), more may well have been required of Respondent in the instant situation.

^{22/} Eltzroth testified that he had the distinct feeling that Respondent did not appreciate the seriousness of the concerns he had raised, was not interested in conducting an actual investigation in response to his concerns, unwilling to look any further than the paperwork, and content with the fact that they were monitoring radiation levels with a badge. *See* Tr. at 25, 29.

enough for the employee to, in frustration, issue some protestation or take some action that is deemed to remove himself/herself from *Pensyl*'s protection. Where an employee refuses work or a work assignment because of a reasonable, good-faith safety concern, *Pensyl* clearly obligates the responsible management official(s) (and others, if appropriate) to investigate the employee's concern(s). If, as a result of the investigation, the work environment is found to be safe, management must adequately explain the results of its investigation to the employee. Unless and until the investigation is concluded and the results thereof explained, the employee's refusal to work in the perceived unsafe environment remains fully protected. The Secretary in *Pensyl* could not have been clearer: an employee's refusal to work loses its protection only "after the perceived hazard has been investigated . . . and if found safe, adequately explained to the employee." *Pensyl*, slip op. at 7 (*emphasis added*).

Thus, I conclude that Eltzroth's refusal to work due to his safety concerns did not lose its protected status and thus, that Eltzroth was wrongfully discharged in violation of Section 211 of the ERA.

E. COOPER BROWN
Member